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No. 97-605

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BEN OEHRLEINS AND SONS AND DAUGHTER, INC., *et al.*,
Petitioners,
v.
HENNEPIN COUNTY, MINNESOTA,
Respondent.

ROBINSON RUBBER PRODUCTS CO., INC., *et al.*,
Petitioners,
v.
HENNEPIN COUNTY, MINNESOTA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL RESTAURANT ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, *amicus*, National Restaurant Association, respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have consented to the filing of the brief. However, this motion is made necessary because the respondent Hennepin County, Minnesota has not responded to our consent request.

Amicus, the leading trade association for the food service industry representing over 32,000 food service providers, has a substantial interest in the legal matters that

affect the costs of solid waste disposal. This case, which involves an ordinance that restricts the markets where restaurants and other waste generators can go for competitive waste disposal prices, presents the question of whether waste generators, as consumers of waste disposal services, have standing to challenge the constitutionality of flow control ordinances such as the one involved in the instant matter.

Since the question presented by the petition is of substantial importance to *amicus'* members, *amicus* respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioner.

Respectfully submitted,

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Association

QUESTIONS PRESENTED

1. Do waste generators, as consumers of waste disposal services, have standing to challenge the constitutionality of a "flow control" ordinance that designates where waste may be disposed of?

2. May consumers that meet Article III standing requirements and have interests that fall within the "zone of interests" to be protected by the Commerce Clause nevertheless be denied constitutional standing on "prudential" grounds?

3. Does a "flow control" ordinance that favors in-state facilities over out-of-state facilities by hoarding the waste disposal market and preventing out-of-state competition discriminate against interstate commerce?

LIST OF PARTIES

The *Oehrleins* matter, No. 96-2120 in the court below, and the *Robinson Rubber* matter, No. 96-2710 in the court below, were considered on consolidated appeal in the court of appeals and judgment was rendered in a single opinion. Consequently, both matters are consolidated in this petition.

Ben Oehrleins and Sons and Daughter, Inc.; Elk River Landfill, Inc.; Gallagher's Service, Inc.; Knutson Services, Inc.; Randy's Sanitation, Inc.; Poor Richard's, Inc.; Vasko Rubbish Removal, Inc.; Wasteco, Inc.; Waste Systems Corp.; and Walter's Recycling & Refuse Service were appellees in the *Oehrleins* matter and are petitioners here.

Robinson Rubber Products Co., Inc.; Dean M. Akins; Patrick Schoenecker; and Brad Robinson, individually and on behalf of all other persons similarly situated, were appellees in the *Robinson Rubber* matter and are petitioners here.

Hennepin County, Minnesota was appellant in both matters below and is respondent here.

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BRIEF *AMICUS CURIAE* OF THE NATIONAL RESTAURANT ASSOCIATION IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Restaurant Association ("Association") is the leading trade association representing over 32,000 restaurants, fast food chains and other food service providers nationwide in every state, including Minnesota.* Restaurants, similarly situated as the Robinson Rubber petitioners (hereinafter "Robinson Rubber") here, generate solid waste.

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* No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

The Eighth Circuit's ruling in this case is of serious concern to the Association and its members for a number of reasons: it upholds an ordinance that creates an intrastate monopoly in the waste disposal industry, which forces restaurants and other designated waste generators to pay more for services previously provided by the free market; it takes away waste generators' right to challenge a monopolistic ordinance by denying them standing, even though the court admits they meet Article III standing requirements; and finally, the decision has wide-spread application because the facts leading to the enactment of the flow control ordinance in this case are not unique. As landfill capacity becomes more costly and scarce, an increasing number of state and local governments may seek to develop new trash control systems. Consequently, other jurisdictions may look to the Eighth Circuit's precedent for guidance in instituting their own flow control programs.

SUMMARY OF ARGUMENT

Amicus urges this Court to grant Petition for Writ of *Certiorari* for a number of reasons. First, as a class that is directly regulated by a flow control ordinance, waste generators have a right of action to challenge the constitutionality of an ordinance that restricts them from seeking more competitive waste disposal markets. This right of action has been stripped away by the Eighth Circuit's denial of standing.

Second, waste generators, as consumers of waste disposal services, overcome "prudential" barriers to standing because they have legally recognized interests that fall within the zone of interests directly protected by the Commerce Clause. Therefore, the Eighth Circuit wrongly denied standing to waste generator appellants on "prudential" grounds.

Third, a discriminatory law, such as the one in question here, is subject to rigorous scrutiny and is unconstitutional *per se* absent a showing by the government

that it has no other means to further a legitimate local interest. The appeals court erroneously found the ordinance to be non-discriminatory, and therefore improperly directed the district court to review the law's constitutionality by using a relatively lenient balancing test.

ARGUMENT

I. PETITION FOR *CERTIORARI* SHOULD BE GRANTED TO ADDRESS THE ISSUE OF STANDING IN ORDER TO ASSURE THAT ROBINSON RUBBER (AND MANY SIMILARLY SITUATED WASTE GENERATORS, SUCH AS RESTAURANTS), WHICH SUFFERED SIGNIFICANT FINANCIAL INJURY AS A RESULT OF A "FLOW CONTROL" ORDINANCE HAS JUDICIAL REDRESS FOR ITS INJURIES.

The court of appeals ruled that Robinson Rubber and other designated waste generators, such as restaurants, that paid artificially inflated waste disposal charges due to flow control have no legal standing to pursue recovery of the overcharges, even though the court conceded that they had been damaged. The court, in effect, narrowed the protection of the Commerce Clause to waste haulers and those individuals or entities that actually paid the inflated costs in the first instance. According to the appeals court, it did not matter that the waste haulers that paid higher "tipping fees" as they dumped their waste at the County incinerator ultimately passed these costs on to their customers, and it was the customers that bore the brunt of the flow control scheme. Instead, the court denied standing to the injured waste generators by characterizing them as "mere consumers" of waste disposal services who were attempting to assert the third party rights of waste haulers. As explained immediately below, the appeals court, contrary to this Court's precedent, erroneously held that consumers do not have standing in their own right to seek judicial relief for injuries caused by violations of the Commerce Clause.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), this Court made clear that in order to have constitutional standing to sue, a plaintiff must demonstrate that (1) an "injury-in-fact" exists—that is, the invasion of a legally recognized interest that is (a) concrete and particularized and (b) actual or imminent, rather than conjectural or hypothetical; (2) the injury is "fairly traceable" to the challenged action; and (3) it is likely that a favorable decision will redress the injury. *Id.* at 560-61. These standing requirements are designed to ensure that plaintiff has alleged sufficient stake in the outcome of the case to assure concrete adverseness as is required by the "cases and controversies" provision of Article III of the U.S. Constitution.

Here, the appeals court found that the waste generator appellants satisfied Article III's requisites for standing: they suffered injuries-in-fact by paying higher waste disposal costs; these higher costs were fairly traceable to the enactment of Ordinance 12, the challenged flow control ordinance; and it is likely that a decision in the waste generators' favor will redress their injuries by awarding them damages and enjoining enforcement of the ordinance.

Notwithstanding the court's finding that generator appellants had Article III standing, the court wrongly concluded that the generators' injuries were "indirectly," traceable to Ordinance 12's restriction on haulers. In fact, the generators' injuries are *directly* traceable to Ordinance 12 because the ordinance expressly restricts generators, as well as haulers. By characterizing the traceability as "indirect," the appeals court found tenuous grounds to conclude that as "mere consumers" of waste disposal services, generators do not have standing to challenge the constitutionality of the ordinance. The court then found that generator appellants were attempting to assert the third party rights of waste haulers and others who directly paid the increased "tipping fees" as they

dumped their waste at the County incinerator and denied them standing on "prudential" grounds.

II. PETITION FOR *CERTIORARI* SHOULD BE GRANTED SINCE THE APPEALS COURT MISAPPLIED THE "PRUDENTIAL LIMITATIONS ON STANDING" DOCTRINE IN THIS CASE.

Even though plaintiffs demonstrate Article III standing, federal courts may nevertheless deny standing on "prudential" grounds when the grant of standing would be practically unwise. *See Schlesinger v. Reservists to Stop the War,* 418 U.S. 208, 221-227 (1974) (plaintiff does not have standing to seek redress for "generalized grievances"); *Warth v. Seldin,* 422 U.S. 490, 500 (1987) (plaintiff does not have standing to assert the rights of third parties). To overcome such prudential limitation on standing, a plaintiff must show that he or she is arguably within the "zone of interests" protected by the statute or constitutional provision relied upon, here the Commerce Clause. *Bennett v. Spear,* 117 S. Ct. 1154, 1161 (1997) (quoting *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 153 (1970)); *Clark v. Securities Industry Association,* 479 U.S. 388, 396 (1987).

This Court has repeatedly held, however, that consumers have interests that fall within the zone of interests to be protected by the Commerce Clause, and therefore have standing to challenge ordinances that unconstitutionally discriminate against interstate commerce. In *Dennis v. Higgins,* 498 U.S. 439 (1991), this Court explicitly stated that the Commerce Clause is for the benefit of individuals engaged in interstate commerce and emphasized:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and

> no foreign state will by customs duties or regulations exclude them. Likewise, *every consumer* may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality. (Emphasis added.)

Id. at 449 (quoting *H. P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 539 (1949)).

Moreover, this Court recently stated in *General Motors Corp. v. Tracy,* 117 S. Ct. 811 (1997), that:

> [c]ognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a state ultimately discriminates, and customers of that class may also be injured, as in [the] case where the customer is liable for payment of the tax and as a result presumably pays more for the gas it gets from out-of-state producers and marketers. Consumers who suffer this sort of injury from regulation forbidden under the Commerce Clause satisfy the standing requirements of Article III.

Id. at 818.

Accordingly, the appellant generators here are not seeking to assert the rights of third parties, but their own rights protected by the Commerce Clause. Moreover, as consumers of waste disposal services, the appellant waste generators are direct participants in the waste disposal market and have interests that fall within the zone of interests to be protected by the Commerce Clause. Consequently, the improper application of the prudential standing test in this case denies standing not only to Robinson Rubber, but to similarly situated waste generators, such as restaurants, who are unconstitutionally forced to pay inflated waste disposal costs. In these circumstances, Commerce Clause jurisprudence gives injured consumers a right of action which is presently being

taken away by the Eighth Circuit. Left unchanged, the Eighth Circuit's ruling traps injured generators in an unconstitutional flow control scheme without providing a judicial forum from which to seek relief. *Certiorari* should be granted to rectify this situation.

III. PETITION FOR *CERTIORARI* SHOULD BE GRANTED BECAUSE THE APPEALS COURT ERRONEOUSLY DIRECTED THE DISTRICT COURT ON REMAND TO APPLY A RELATIVELY LENIENT BALANCING TEST, RATHER THAN "RIGOROUS SCRUTINY," IN EVALUATING THE CONSTITUTIONALITY OF ORDINANCE 12.

Though the appeals court denied standing to the waste generator appellants, it granted standing to the waste hauler appellants (represented by Ben Oehrleins and Sons and Daughters, Inc.). The court then held that Ordinance 12 as enforced on waste that stays within the state—that is, "intrastate" flow control—does not discriminate against interstate commerce, and therefore violates the Commerce Clause only if it fails the balancing test set forth in *Pike v. Bruce Church,* 397 U.S. 137 (1970). The *Pike* test applies to non-discriminatory state laws and upholds such laws "unless the burden imposed on . . . commerce is clearly excessive in relation to the putative benefits." *Id.* at 142. The court remanded the question of whether Ordinance 12 as applied to intrastate commerce unconstitutionally discriminates against interstate commerce, but erroneously directed the district court to apply the inappropriate level of scrutiny by instructing it to use the *Pike* balancing test. As proven below, Ordinance 12 is discriminatory, not non-discriminatory. Therefore, "rigorous scrutiny" is the proper test to determine its constitutionality.

In a Commerce Clause challenge, the burden is initially on the plaintiff to show that the legislation is discriminating against interstate commerce on its face or in its

purpose or effect. *Hughes v. Oklahoma,* 411 U.S. 322, 326 (1979). Flow control laws that discriminate in favor of local waste facilities trigger heightened scrutiny because they hoard a valuable economic resource such as garbage. *C & A Carbone, Inc. v. Town of Clarkstown,* 114 S. Ct. 1677, 1682-83 (1994). A statute that discriminates in favor of a local investment is *per se* unconstitutional "save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate state interest." *Id.* at 1683 (citing *Maine v. Taylor,* 477 U.S. 131 (1986)). For purposes of the Commerce Clause, "discrimination" means "differential treatment of in-state and out-of-state economic interests that benefit the former and burden the latter." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality of Oregon,* 114 S. Ct. 1345, 1350 (1994).

Ordinance 12 as written requires all "Designated Waste" generated within Hennepin County to be delivered to "Designated Facilities." One of the two designated facilities is a municipal incinerator which the County constructed by issuing approximately $150,000,000 in bonds. This designation allowed the County to charge substantially higher fees than those charged by other waste disposal facilities.

In addition, Ordinance 12, as written, prohibits the out-of-state disposal of County waste. In 1993, rather than permanently amend Ordinance 12, the County merely suspended, "until further notice," enforcement of the ordinance with respect to waste destined for out-of-state disposal. The ordinance was suspended rather than amended with the express purpose of discouraging interstate commerce by threatening of out-of-state enforcement at any time. This purpose is evidenced by a legal memorandum sent from the County's legal counsel to the County Administrator and read, in pertinent part:

> [S]uspending the enforcement of designated waste destined for disposal outside the state of Minnesota [] would put haulers on notice that it would not be prudent to enter into long-term contracts for waste disposal outside of the state at this time. . . .
>
> The risk [that the entire Ordinance may be found to be unconstitutional] is, however, probably preferable to suspending enforcement of both in-state and out-of-state disposal, resulting in the County losing the waste altogether, to long-term hauler contracts.

See Appendix 121a of Petitioners' Petition for Writ of *Certiorari.*

Plainly, Ordinance 12's differential treatment of in-state and out-of-state economic interests benefits the former by increasing County revenues by hoarding the waste disposal market and burdens the latter by dramatically restricting access to the County's waste disposal market. Moreover, the ordinance's underlying discriminatory purpose of discouraging out-of-state waste disposal is revealed by the County's internal legal memorandum. Such differential treatment is, by definition, discriminatory, and therefore unconstitutional *per se* unless the County can prove, under rigorous scrutiny, that it has no other means to advance a legitimate local interest. *Certiorari* should be granted to correctly instruct the district court to use rigorous scrutiny to evaluate Ordinance 12's constitutionality, rather than the *Pike* balancing test ordered by the appeals court.

CONCLUSION

For all the foregoing reasons, The National Restaurant Association requests that this Honorable Court grant Oehrlein's and Robinson Rubber's consolidated Petition for Writ of *Certiorari*.

Respectfully submitted,

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